[IN THE PRIVY COUNCIL]

1958 *Present:* Viscount Simonds, Lord Cohen, Lord Keith of Avonholm, Lord Somervell of Harrow and Mr. L. M. D. de Silva

D. T. SAMARATUNGA, Appellant, *and* THE QUEEN, Respondent

Privy Council Appeal No. 27 of 1957

Contempt of Court—Perjury—Sections 439 and 440 of Criminal Procedure Code—Penal Code, s. 188.

The appellant, who was one of the accused in a trial before the Supreme Court, was acquitted for the reason that a witness G., upon whose evidence as given in the non-summary proceedings the case against the appellant had been based, gave contradictory evidence at the trial. At the summary trial of the witness under section 439 of the Criminal Procedure Code for giving false evidence, the witness pleaded guilty. With a view to deciding on the appropriate sentence the trial Judge wanted to hear evidence with regard to what he called "the background". He called four persons, one of whom was the appellant. He asked the appellant a number of questions and came to the conclusion that the appellant was deliberately lying, in particular in saying that the witness G. had never been his servant and that he did not know him. Accordingly, under the powers conferred by section 440 of the Criminal Procedure Code, he made order sentencing the appellant to three months rigorous imprisonment for having given false evidence during the course of a criminal trial.

Held, that the order of the trial Judge was not obnoxious to the provisions of section 440 of the Criminal Procedure Code.

APPEAL by special leave from an order of a Commissioner of Assize of the Supreme Court.

Dingle Foot, Q.C., with *Joseph Dean* and *Miss D. Phillips*, for the appellant.

T. O. Kellock, for the respondent.

Cur. adv. vult.

April 23, 1958. [*Delivered by* LORD SOMERVELL OF HARROW]—

This is an appeal by special leave from an Order of a Commissioner of Assize of the Supreme Court of Ceylon sentencing the appellant to three months rigorous imprisonment for having given false evidence during the course of a criminal trial. The Order was made under the powers conferred by Section 440 (1) of the Criminal Procedure Code. That Section reads as follows:—

"440.—(1) If any person giving evidence on any subject in open Court in any judicial proceeding under this Code gives, in the opinion of the Court before which the judicial proceeding is held, false evidence within the meaning of Section 188 of the Penal Code it shall be lawful for the Court, if such Court be the Supreme Court, summarily to sentence such witness as for a contempt of the Court to imprisonment either simple or rigorous for any period not exceeding

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three months or to fine such witness in any sum not exceeding two hundred rupees or if such Court be an inferior Court to order such witness to pay a fine not exceeding fifty rupees and in default of payment of such fine to undergo rigorous imprisonment for any period not exceeding two months. Whenever the power given by this Section is exercised by a Court other than the Supreme Court the Judge or Magistrate of such Court shall record the reasons for imposing such fine.

(2) Any person who has undergone any sentence of imprisonment or paid any fine imposed under this section shall not be liable to be punished again for the same offence.

(3) Any person against whom any order is made by any court other than the Supreme Court under subsection (1) of this section may appeal to the Supreme Court and every such appeal shall be subject to the provisions of this Code.

(4) In lieu of exercising the power given by this section the court may if it thinks fit transmit the record of the judicial proceeding to the Attorney-General to enable him to exercise the powers conferred on him by this Code or proceed in manner provided by section 380.

(5) Nothing in this section contained shall be construed as derogating from or limiting the powers and jurisdiction of the Supreme Court or the Judges thereof. "

Section 188 of the Penal Code is as follows :—

" 188. Whoever, being legally bound by an oath or affirmation, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give ' false evidence '.

" Wherever in any Ordinance, the word ' perjury ' occurs, such Ordinance shall be read as if the words ' giving false evidence ' were therein used instead of the word ' perjury '.

" *Explanation* 1.—A statement is within the meaning of this section whether it is made verbally or otherwise.

" *Explanation* 2.—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

" Illustrations..... "

In Supreme Court Case No. 10 before the same Commissioner the appellant had been indicted with one Yothan Singho, the latter with attempting to murder one Peiris Singho and the appellant with aiding and abetting. In the non-summary proceedings before the Magistrate, one Gunatilleke had given evidence that he was employed by the appellant and that the appellant had given him and Yothan Singho arrack and a club and had directed them to go and kill Peiris Singho.

At the trial Gunatilleke while continuing to say that he was in the appellant's employment said that the rest of his evidence as summarised above was fabricated. He said that he had given his earlier evidence at the request of Peiris Singho's wife and that he had been promised Peiris Singho's daughter Kusumawathie in marriage if he gave this false evidence. He produced two documents which he said had been given him by Peiris Singho's wife containing the false evidence.

The case against the appellant had been based on Gunatilleke's evidence as given in the Magistrate's Court. There was no other evidence against him ; the learned Commissioner therefore directed the jury to acquit the appellant and this was done, the case proceeding against Yothan Singho, who ultimately pleaded guilty.

The learned Commissioner directed the Clerk of Assize to prepare an indictment against Gunatilleke under Section 439 of the Criminal Procedure Code which reads as follows :—

> " 439. (1) If in the course of a trial in any District Court or of a trial by jury before the Supreme Court any witness shall on any material point contradict either expressly or by necessary implication the evidence previously given by him at the inquiry before the Magistrate, it shall be lawful for the presiding Judge, upon the conclusion of such trial, to have such witness arraigned and tried on an indictment for intentionally giving false evidence in a stage of a judicial proceeding. In a trial before the Supreme Court the indictment shall be prepared and signed by the Registrar, and the accused may be tried by the same jury. In a trial in a District Court the indictment shall be prepared and signed by the secretary of such court.
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> (2) At such trial it shall be sufficient to prove that the accused made the contradictory statements alleged in the indictment, and it shall not be necessary to prove which of such statements is false.
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> (3) The presiding Judge may, if he considers expedient, adjourn the trial of such witness for such period as he may think fit, and may commit such witness to custody or take bail in his own recognizance or with sureties for his appearance. In the Supreme Court such adjourned trial shall be before the same or any other jury as the Judge shall direct. "

Gunatilleke pleaded guilty.

The learned Commissioner wanted to hear evidence with regard to what he called ' the background ' with a view to deciding on the appropriate sentence. If the statement made to the Magistrate was fabricated Gunatilleke had sworn false evidence incriminating an innocent man to further a love affair. If that evidence was true his evidence at the trial might have been due to a desire to shield the appellant, whom everyone had described as his master, as a result of or in hope of some payment. The learned Commissioner might have left Gunatilleke to give or call evidence in mitigation if he so desired. His counsel made various statements on instructions to the effect that his evidence just given at the trial was the truth. The learned Commissioner decided himself to have witnesses called and ordered that Peiris Singho, Punchi

Nona his wife, Kusumawathie his daughter, and the appellant should be called. The wife and daughter both denied that they had written the documents produced by Gunatilleke or that there was any truth in his story of his possible marriage with the daughter. The daughter said that Gunatilleke was employed by the appellant.

The appellant then gave evidence being examined by Crown Counsel, and in the course of his examination he was asked a number of questions by the learned Commissioner. The learned Commissioner came to the conclusion that he was deliberately lying, in particular in saying that Gunatilleke had never been his servant, that he did not know him, though he had once seen him in the bazaar, and that he did not know his name until he gave evidence against him. It was in respect of this evidence that the sentence appealed from was imposed.

In *Chang Hang Kiu v. Sir Francis T. Piggot*[1] this Board considered an Ordinance of Hong Kong in similar terms to Section 440 (1) of the Ceylon Criminal Procedure Code. It was laid down that before an order was made under such a provision the gist of the accusation must be made clear to the witness and he must be given an opportunity of giving reasons against summary measures being taken. The witnesses in that case had not been given such an opportunity and the appeal was allowed. This decision assimilated the procedure to that laid down by the Board for ordinary contempt of Court *In re Pollard*[2].

It was submitted for the appellant that neither of the above conditions were satisfied. The only basis for this submission was that the nature of the charge which had already been indicated in general terms was particularised with regard to one specific point after the appellant had been clearly given an opportunity to give reasons against summary measures being taken. In their Lordships' opinion this point fails.

It was further submitted that the learned Commissioner had done that which was held to be wrong in *Subramaniam v. The Queen*[3]. The appellant in that case was a witness in a murder trial. The learned trial Judge came to the conclusion as the evidence was called that there had been a conspiracy between the accused man, the appellant and the police to suppress evidence. He came to the conclusion that the evidence as given did not justify leaving the case to the jury whom he directed to bring in a verdict of not guilty. This was on March 15th.

Later on that day and on March 16th and 18th the learned Judge called the appellant and others whom he suspected. The appellant and others were represented by Counsel. Medical evidence was called on behalf of one of those suspected. The appellant was sentenced on March 18th. There were other unsatisfactory features as appear from the Record but it was in these circumstances that Lord Oaksey in delivering the Judgment of the Board used these words.

> "In their Lordships' opinion the course taken by the commissioner was misconceived. The summary power conferred by section 440 (1) is one which should only be used when it is clear beyond doubt that a witness in the course of his evidence in the case being tried has

[1] [*1909*] *A. C. 312.*
[2] [*1956*] *1 W. L. R. 456, 57 N. L. R. 409.*
[3] *(1868) L. R. 2 P. C. 106.*

committed perjury. It was, in their Lordships' opinion, never intended that in the exercise of the power under section 440 (1) in the course of a criminal trial a subsidiary criminal investigation should be set on foot not against the prisoner charged but against the witnesses in the case. If such an investigation is necessary it can and should be set on foot under section 440 (4). "

Nothing of the kind took place in the present appeal. The evidence was given in the course of the trial, in relation to sentence. This point also fails.

The appellant further submitted that the learned Commissioner's discretion had not been judicially exercised and that the case was not a proper one for section 440. Their Lordships have carefully considered the points made subsidiary to the points already considered and are satisfied that there is no substance in them. The learned Commissioner regarded the matter as clear beyond doubt. He saw and heard the witness and there was clearly material on which he could be so satisfied.

Their Lordships were referred to a number of cases in Ceylon in which this Section has been considered. In some cases it is said it should not be used where there is a conflict of testimony (see Bonser, C.J., in *Andris v. Juanis*[1], *Ahamath v. Silva*[2], *Dassanayaka v. Excise Inspector, Horana*[3]).

From its nature the power is one which should only be used when the Judge is " clear beyond doubt "—to take the words used by Lord Oaksey in Subramaniam's case—that the witness has given false evidence as defined. Subject to that over-riding principle their Lordships adopt what was said by Wood Renton, C.J., in *Banda v. Sada*[4].

> " The true interpretation of the scope of section 440 of the Criminal Procedure Code appears to be this. The Legislature has left the Courts quite free as a matter of law to deal under that section with any form of ' false evidence ' within the meaning of section 188 of the Penal Code, and if we attempt to fetter that discretion by rigid general rules as to the class of cases in which it may or may not be exercised, we shall be acting rather in a legislative than in a judicial capacity, and running the risk of paralysing the operation of a statutory power, the maintenance of which in full working order is essential to the administration of justice in this country. But there is ancient and sound authority for the proposition that ' all things that are lawful are not expedient ', and we have every right to consider ourselves, in the exercise of our original jurisdiction, and in the exercise of our appellate jurisdiction [entitled] to inquire whether this statutory power can be safely exercised in any particular case that has come before us. "

Their Lordships regret that the respondent who successfully opposed the appeal was not represented for the assistance of the Board when the petition for leave to appeal was heard.

For the reasons which have been stated their Lordships have humbly advised Her Majesty that this appeal be dismissed.

Appeal dismissed.

[1] *(1896) 2 N. L. R. 74.*
[2] *(1920) 22 N. L. R. 444.*
[3] *(1946) 47 N. L. R. 47.*
[4] *(1914) 17 N. L. R. 510, 512.*